IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

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CLEVELAND

UNITED STATES OF AMERICA,	)	INFORMATION
Plaintiff,	)	CASE. NO.
v.	)	JUDGE
ROBERT G. COLE,	)	Title 15, Sections 78j(b), 78ff(a), United States Code and Title 17, Code of Federal Regulations, § 240.10b-5
Defendant.	)	

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JUDGE GWIN

The United States Attorney charges:

COUNT ONE
(Insider Trading)

I. BACKGROUND

At all times relevant to this Information:

1. Diebold, Inc. ("Diebold" or the "Company") was an Ohio corporation headquartered in North Canton, Ohio. Diebold manufactures and sells ATMs, bank security systems, and electronic voting terminals. Diebold's common stock was publicly traded under the symbol "DBD" on the New York Stock Exchange, a national securities exchange. Diebold had shareholders located throughout the United States, including in the Northern District of Ohio.

2. The defendant, ROBERT G. COLE, was a sales representative within the Diebold North American regional bank business, selling products and services to Diebold's regional bank customers in western Oklahoma. COLE worked for Diebold under a Diebold, Incorporated Manufacturer's Representative Agreement. As a sales representative, COLE regularly received from Diebold confidential information concerning Diebold's North American regional bank business.

II. RELEVANT LEGAL AND ECONOMIC PRINCIPLES

3. The federal securities laws are intended to ensure honest markets and to promote investor confidence. Investors have a legitimate expectation that the prices of actively traded securities reflect publicly available information about the companies that issue those securities.

4. Insider trading undermines investor confidence in the integrity of the securities markets. Insider trading occurs when corporate insiders, such as directors, officers, or employees, trade company securities on the basis of material nonpublic information.

5. Rule 10b-5, promulgated under the Securities Exchange Act of 1934, prohibits insider trading.

6. A "put option" contract is a security that gives the purchaser the right to sell 100 shares of the underlying stock for a specified price, which is called the "strike price," until the expiration date of the option contract. Generally, the value of a put option contract will increase as the price of the underlying stock decreases, and will decrease as the price of the underlying stock increases. Investing in put options can be very risky. For example, if the option is held to expiration and the price of the underlying security rises above the strike price, the option will expire worthless.

III. DIEBOLD'S INSIDER-TRADING POLICY

7. As a publicly traded company, Diebold adopted an insider-trading policy that prohibited trading in company securities by corporate employees while in possession of material nonpublic information.

8. Diebold's insider-trading policy defined material "inside" information as "important confidential information . . . which ha[d] not been publicly released. Diebold employees "who have material inside information" could not "buy or sell Diebold, Incorporated securities until the information ha[d] been released to the public and enough time ha[d] passed to allow investor reaction."

9. In May 2005, COLE signed a Manufacturer's Representative Agreement with Diebold that expressly prohibited COLE from disclosing or using for his own benefit, Diebold's confidential information. Consequently, COLE owed a duty to Diebold not to use confidential information he received from Diebold for his own personal benefit. In the agreement, COLE stated: "During the term of my employment . . . and thereafter, I will not disclose to any unauthorized person or use for my own benefit . . . any confidential information provided by Diebold . . . so long as the information is not legitimately in the public domain."

IV. THE DEFENDANT'S POSSESSION AND USE OF MATERIAL NONPUBLIC INFORMATION

A. Diebold's Earnings Guidance For the Third Quarter and Full Year of 2005

10. On July 27, 2005, Diebold publicly announced its second quarter earnings and provided investors with earnings guidance for the third quarter, which ended on September 30, 2005, and for the entire year of 2005. In a public conference call that day with analysts and investors, Diebold's chief executive officer ("CEO") forecasted that Diebold's *pro forma* earnings would be $0.62 to $0.67 per share in the third quarter of 2005, and $2.60 to $2.70 per share for the entire year of 2005.

11. During that conference call, Diebold's CEO stated that "[l]ooking forward to the third quarter, we expect revenue to increase 9 to 11 percent . . ., with good performance across all businesses." In response to an analyst question concerning the North American ATM market, Diebold's CEO further stated that: "We weren't particularly happy with our regional bank orders in [the second quarter]. But the pipeline looks solid. Our forecast looks solid. I think our growth this year is going to lead more internationally, but we see a solid U.S. market."

12. Prior to September 21, 2005, Diebold did not issue any further public earnings guidance for the third quarter or for the entire year of 2005.

B. North American ATM Market Order and Revenue Shortfall

13. On the evening of September 13, 2005, COLE and other Diebold sales representatives received from their sales manager two emails with attached financial reports concerning Diebold's North American regional bank business. These emails and the attached reports contained material, nonpublic information, including the following:

a. The first email stated that revenues from Diebold's U.S. regional bank customers in August were 89.9 percent of that month's target, and that year-to-date revenues from the company's U.S. regional bank customers were 78.8 percent of the year-to-date target. The financial report attached to this email also showed, among other information, that revenues from Diebold's sales to regional banks totaled only $71.9 million in July and August, which was 27 percent short of target for those two months, and 3.4 percent lower than revenues in the same two months in 2004.

b. The second email stated that Diebold's U.S. regional bank customer orders in August were 76.5 percent of that month's target, and that year-to-date orders from the company's U.S. regional bank customers were 90.1 percent of the year-to-date target. The financial report attached to this email also showed, among other information, that Diebold's orders from regional banks in July and August totaled only $71.2 million, which was 25.9 percent short of target for those two months, and 24 percent lower than in the same two months in 2004. These July and August monthly order totals were lower than any other preceding month that year. Because orders are the leading indicator of future revenues, this shortfall in orders indicated a likely shortfall in previously anticipated revenues.

14. The revenue and order information in the two September 13, 2005, emails and the attached reports were both nonpublic and material. Diebold's sales to regional banks typically represented approximately 20 percent of Diebold's total revenues and were the company's most profitable sales. A significant shortfall in revenues and orders by the company's North American regional bank business in July and August of 2005, likely would cause Diebold to lower its

previously announced earnings forecasts for the third quarter of 2005 and for the entire year of 2005.

15. A reasonable investor would have considered the revenue and order information in both September 13, 2005, emails important to his or her investment decision, and a significant alteration of the total mix of information available to the public.

16. COLE reviewed both September 13, 2005, emails and the attached financial reports.

C. **<u>COLE's Insider Trading</u>**

17. On the morning of September 15, 2005, while in possession of the material, nonpublic information contained in the two September 13, 2005, emails, COLE began placing orders to purchase Diebold "put option" contracts, and continued purchasing Diebold put options contracts through September 20, 2005. In total, COLE purchased 470 Diebold put option contracts with a $45 "strike price" and an October 21 expiration date, and 306 Diebold put option contracts with a $40 "strike price" and a November 18 expiration date, for a total cost of $70,110.

18. While in possession of material inside information concerning revenue and order shortfalls at Diebold, COLE purchased the put option contracts anticipating that Diebold would issue an earnings warning and that the price of Diebold stock would fall. COLE knew, or was reckless in not knowing, that he purchased Diebold put option contracts using material, nonpublic information in breach of his duty to Diebold.

D. <u>Diebold's September 21, 2005 Earnings Warning</u>

19. On September 21, 2005, before the market opened, Diebold issued to the public a press release announcing a significant earnings warning. Specifically, in that press release Diebold lowered its *pro forma* earnings forecast for the third quarter of 2005 from $0.62 to $0.67 per share, to $0.32 to $0.37 per share, and lowered its *pro forma* earnings forecast for the entire year of 2005 from $2.60 to $2.70 per share, to $1.90 to $2.00 per share. In the press release, Diebold explained that it was lowering its earnings guidance because the revenue from its financial, self-service business line was expected to be more than $50 million lower in the third quarter than its prior guidance had anticipated, with "most of the shortfall occurring in North America as the company experienced continued market weakness in the more profitable regional bank segment."

20. In a public conference call with analysts and investors following this press release, Diebold's chief financial officer stated that, with regard to the third quarter, the company's "significant reduction in earnings-per-share guidance is being driven by the lower financial self-service revenue expectations, especially in North America," and that "[t]his reduction is particularly adverse to earnings-per-share because it is concentrated in the more profitable regional bank segment." In that same conference call, Diebold's CEO stated that, with regard to the company's North American regional bank business, "we see a slowdown," and that "[w]e've certainly seen a major slowdown in the southeast part of the country and that's exactly what's behind our revised outlook."

21. As a result of Diebold's earnings warning on September 21, 2005, the company's stock price fell sharply that day to close at $37.27, down more than 16 percent from the previous day's closing price of $44.13.

E. <u>COLE Profits From His Insider Trading</u>

22. On September 22, 2005, and September 23, 2005, COLE sold all the put option contracts he had purchased while in possession of material, nonpublic information.

23. COLE paid approximately $70,110 for the put option contracts he purchased from September 13, 2005, through September 20, 2005. He sold these put option contracts for approximately $579,190, realizing illicit profits of approximately $509,080.

<u>V. STATUTORY ALLEGATIONS</u>

24. Paragraphs 1 through 23 are realleged as if fully set forth herein.

25. Between on or about September 13, 2005, and on or about September 23, 2005, in the Northern District of Ohio, Eastern Division, and elsewhere, the defendant, ROBERT G. COLE, did willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the facilities of a national securities exchange, use and employ manipulative devices and contrivances in connection with the purchase and sale of securities, namely, the common stock of Diebold, in contravention of the rules and regulations prescribed by the Securities and Exchange Commission, namely, Securities Exchange Act Rule 10b-5, by (a) employing a device, scheme, and artifice to defraud; (b) omitting to state material facts necessary to make statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices, and courses of dealing which would and did operate as a fraud and deceit.

26. Specifically, between on or about September 13, 2005, and on or about September 23, 2005, on the basis of material nonpublic information regarding the performance of Diebold, ROBERT G. COLE, the defendant, purchased "put option" contracts of Diebold stock, obtaining an illegal profit of approximately $509,080, in breach of his duty not to trade in Diebold stock while in possession of material, nonpublic information regarding Diebold.

All in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5.

FORFEITURE

The United States Attorney further charges:

27. The allegations contained in Count One of this Information are hereby incorporated by reference for the purpose of alleging that certain property is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

28. As a result of the offense alleged in Count One of this Information (to wit: Insider Trading, in violation of 15 U.S.C. §§ 78j(b) & 78ff(a) and 17 Code of Federal Regulations § 240.10b-5), ROBERT G. COLE, the defendant herein, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), any and all property, real and personal, which constitutes or is derived from proceeds traceable to such offense; including, but not limited to: funds in the amount of $509,080.00.

William J. Edwards
WILLIAM J. EDWARDS
ACTING UNITED STATES ATTORNEY